Public Prosecutor v Zhao Jingeng & Ors

HIGH COURT (SHAH ALAM) — CRIMINAL REVISION NO 43–42 OF 2009
YEOH WEE SIAM JC
13 OCTOBER 2009

Criminal Procedure — Revision — Application to revise magistrate's order — Magistrate agreed that 26 respondents were trafficked persons but ordered their release under s 51(3)(b)(ii) of the Anti-Trafficking in Persons Act 2007 — Whether magistrate erred in fact and in law — Whether magistrate considered the report of investigation officer and protection officer before making order — Anti-Trafficking in Persons Act 2007 s 51(2), 51(3)(a)(ii) & (b)(ii) — Criminal Procedure Code s 323

Chin Fung Chu ('the accused') was arrested at the Kuala Lumpur International Airport by enforcement officer of the immigration department and later charged for the offence of trafficking in persons under s 12 of the Anti-Trafficking in Persons Act 2007 ('the Act'). After the arrest of the accused the same enforcement officer rescued 26 citizens of the Republic of China ('the 26 respondents') who were victims of the trafficking by the accused. Thereafter, an application for an interim protection order ('IPO') was made and granted to place the 26 respondents in a place of refuge for 14 days for the purpose of carrying out an investigation and enquiry under s 51 of the Act. At the expiry of the 14 days a further application was made by the investigating officer of the immigration department ('the IO') to extend the IPO for three months for the purpose of recording the statement or deposition of the 26 respondents. In support of his application under s 51(2) of the Act, the IO tendered a report of his investigations of all the 26 respondents. In his report the IO concluded that the 26 persons were trafficked persons because their genuine passports from China were changed to forged Hong Kong passports and because whilst the 26 respondents were in Malaysia, they were confined to their place of accommodation. The protection officer also tendered his report as required under s 52(1) of the Act. However, the protection officer's report was only in relation to the nine female respondents and no report was made as to the remaining seventeen male respondents. In his report the protection officer concluded that the nine female respondents were not trafficked persons but were on their way from Hong Kong to Argentina or Brazil for tourism, employment or family matters. The magistrate hearing the application agreed with the conclusions of the IO and ordered that the 26 respondents be handed over to the

immigration department as provided in s 51(3)(b)(ii) of the Act. This was an application by the public prosecutor for the revision of that order. The prosecution submitted that the magistrate had erred in fact and in law in making his order, in that if the magistrate agreed with the IO's report and findings the order should be made under s 51(3)(a)(ii) and not s 51(3)(b)(ii) of the Act.

Held, allowing the applicant's revision application:

(1) It was erroneous for the magistrate to decide on the one hand that he agreed with the IO's conclusions and then on the other hand act in a contrary manner under s 51(3)(b)(ii) of the Act and conclude that the 26 respondents were not trafficked persons and to order their release. Due to this error of the magistrate, the 26 respondents who were trafficked persons were purportedly released and this in turn hampered the work of the IO in recording their evidence under s 52 of the Act (see para 17).

(2) Before making the order to allow an extension of time for the placement of the 26 respondents, the magistrate should have read the reports of the IO and the protection officer, as required under s 51(3) of the Act, to determine whether 26 respondents were trafficked persons. In the present case, the protection officer only made a report on nine out of the 26 respondents but there was nothing in the records to show that the magistrate considered that report. According to the records the magistrate made the order after considering only the report of the IO. That also a legal error on the part of the magistrate. In any event it was the IO's report that was more relevant in the instant case as it was not about the background and personal information regarding the person but instead about whether such a person was a trafficked person (see paras 26–27 & 29).

(3) Based on the report by the IO it was clear that the 26 respondents were trafficked persons and the order by the magistrate should be made under s 51(3)(a)(ii) and not s 51(3)(b)(ii) of the Act. The magistrate had erred in fact and in law and his decision to release the 26 respondents under s 51(3)(b)(ii) of the Act was incorrect and improper under s 323 of the CPC. The 26 respondents were to be placed in a place of refuge for a period not exceeding three months from the date of expiry of the first IPO for the recording of their deposition (see paras 30–31).

[Bahasa Malaysia summary

Chin Fung Chu ('tertuduh') ditangkap di Lapangan Terbang Antarabangsa

Kuala Lumpur oleh pegawai penguatkuasa jabatan imigresen dan kemudiannya dipertuduh untuk kesalahan memperdagangkan orang di bawah s 12 Akta Anti Pemerdagangan Orang 2007 ('Akta'). Selepas penangkapan tertuduh, pegawai penguatkuasa yang sama menyelamatkan 26 orang warganegara Republik China ('26 orang responden') yang merupakan mangsa-mangsa pemerdagangan oleh tertuduh. Kemudiannya, permohonan untuk perintah perlindungan interim ('PPI') dibuat dan diberikan untuk menempatkan 26 orang responden di tempat perlindungan untuk 14 hari bagi tujuan menjalankan penyiasatan dan pertanyaan di bawah s 51 Akta. Permohonan lanjutan untuk melanjutkan PPI selama tiga bulan dibuat bagi tujuan merekodkan pernyataan atau deposisi 26 orang responden tersebut oleh pegawai penyiasat jabatan imigresen ('IO') setelah tamat tempoh 14 hari. Bagi menyokong permohonannya di bawah s 51(2) Akta, IO menender laporan penyiasatannya terhadap kesemua 26 orang responden. Dalam laporannya, IO membuat kesimpulan bahawa 26 orang tersebut merupakan orang yang diperdagangkan kerana pasport asal mereka daripada China diubah kepada pasport Hong Kong yang dipalsukan dan semasa 26 orang responden tersebut berada di Malaysia, mereka dikurung di tempat penginapan mereka. Pegawai perlindungan juga menender laporannya seperti yang diperlukan di bawah s 52(1) Akta. Walau bagaimanapun, laporan pegawai perlindungan tersebut hanya berkenaan sembilan orang responden perempuan dan tiada laporan dibuat berkenaan 17 orang responden lelaki lainnya. Dalam laporannya, pegawai perlindungan membuat kesimpulan bahawa sembilan orang responden perempuan tersebut bukannya orang yang diperdagangkan tetapi dalam perjalanan dari Hong Kong ke Argentina atau Brazil bagi tujuan perlancongan, pekerjaan atau urusan keluarga. Majistret yang membicarakan bersetuju dengan kesimpulan IO dan mengarahkan 26 orang responden diserahkan kepada jabatan imigresen sepertimana yang diperuntukkan dalam s 51(3)(b)(ii) Akta. Ini merupakan permohonan oleh pendakwa raya untuk semakan perintah tersebut. Pihak pendakwaan menghujah bahawa majistret telah khilaf dalam fakta dan undang-undang dalam membuat perintahnya, di mana sekiranya majistret bersetuju dengan laporan IO dan dapatannya, maka perintah seharusnya dibuat di bawah s 51(3)(a)(ii) dan bukannya s 51(3)(b)(ii) Akta.

Diputuskan, membenarkan permohonan semakan pemohon:

(1) Adalah salah bagi majistret untuk memutuskan bahawa beliau bersetuju dengan kesimpulan IO dan pada masa yang sama bertindak sebaliknya di bawah s 51(3)(b)(ii) Akta dan memutuskan bahawa 26 orang responden tersebut bukannya orang yang diperdagangkan dan mengarahkan pembebasan mereka. Disebabkan kesilapan majistret, 26 orang responden yang merupakan orang yang diperdagangkan

dibebaskan dan ini menghalang kerja IO dalam merekodkan keterangan mereka di bawah s 52 Akta (lihat perenggan 17).

(2) Sebelum membuat perintah untuk membenarkan lanjutan masa untuk menempatkan 26 orang responden, majistret perlu membaca laporan IO dan pegawai perlindungan seperti yang diperlukan di bawah s 51(3) Akta, untuk menentukan sama ada 26 orang responden merupakan orang yang diperdagangkan. Dalam kes ini, pegawai perlindungan hanya membuat laporan ke atas 9 daripada 26 orang responden tetapi tiada apa-apa di dalam rekod menunjukkan bahawa majistret telah mempertimbangkan rekod tersebut. Menurut rekod tersebut, majistret membuat tawaran selepas hanya mempertimbangkan laporan IO. Itu juga merupakan kesalahan undang-undang dari pihak majistret. Dalam mana-mana keadaan, laporan IO lebih relevan dalam kes ini memandangkan ia bukannya mengenai maklumat latar belakang dan peribadi tetapi mengenai sama ada individu tersebut merupakan orang yang diperdagangkan (lihat perenggan 26–27 & 29).

(3) Berdasarkan laporan oleh IO, adalah jelas bahawa 26 orang responden merupakan individu-individu diperdagangkan dan perintah oleh majistret perlu dibuat di bawah s 51(3)(a)(ii) dan bukannya s 51(3)(b)(ii) Akta. Majistret terkhilaf dalam fakta dan undang-undang dan keputusannya untuk melepaskan 26 orang responden di bawah s 51(3)(b)(ii) Akta adalah tidak betul dan salah di bawah s 323 KPJ. 26 orang responden tersebut diarahkan untuk ditempatkan di tempat pelarian tidak melebihi tiga bulan dari tarikh tamat PPI untuk merekodkan deposisi mereka (lihat perenggan 30–31).]

Notes

For cases on revision generally, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3106–3217.

Cases referred to

PP v Nam Oithantip [2008] 5 CLJ 285, HC (folld)

Legislation referred to

Anti-Trafficking in Persons Act 2007 ss 12, 44(2), 51, 51(1), (1)(a), (b), (2), (3), (3)(a), (a)(ii), (b)(ii), (5), 52, 52(1)
Criminal Procedure Code s 323, Chapter XXXI

Mohd Dusuki bin Mokhtar (Deputy Public Prosecutor, Attorney General's Chambers) for the applicant.
Respondents in person.

Yeoh Wee Siam JC:

[1] This is an application for revision made by the public prosecutor in

respect of the order made by the learned magistrate of the Magistrate's Court Telok Datok, Klang, Selangor ('the magistrate'). A

BRIEF FACTS

[2] On 4 August 2009 at the Kuala Lumpur International Airport ('KLIA'), Sepang, enforcement officers of the immigration department arrested a Malaysian, Chin Fung Chu ('the accused'), for a suspected offence under the Anti-Trafficking in Persons Act 2007 ('the Act'). B

[3] After the arrest of the suspect, the same enforcement officers successfully rescued 26 citizens of the Republic of China ('China') ie 17 men and nine women who were suspected to be victims of human trafficking by the accused ('the 26 respondents'). C

[4] After investigations by the immigration department, an application was made to the Magistrate's Court Sepang ('the Sepang Court') for an interim protection order ('IPO') on 4 August 2009. D

[5] The magistrate of the Sepang Court on the same day made an IPO ordering that the 26 respondents be placed at a place of refuge for 14 days from 4 August 2009 to 17 August 2009 for the purpose of carrying out an investigation and enquiry under s 51 of the Act. E

[6] The accused was charged on 8 August 2009 for the offence of trafficking in persons under s 12 of the Act. F

[7] On 17 August 2009 the investigating officer of the immigration department ('the IO') made an application under s 51(2) of the Act to the Magistrate's Court Telok Datok, Klang, Selangor for a protection order for the 26 respondents who were suspected to be trafficked persons. In order to support the application, the IO tendered a report of his investigations. A report made by the protection officer under s 52(1) of the Act was also tendered. G

[8] The report of the protection officer was only in relation to the nine female respondents. No report on the other 17 male respondents was made. In the report, the protection officer, after interviewing the nine female respondents, concluded that the nine female respondents are not trafficked persons but were on their way from Hong Kong to Argentina or Brazil for tourism, employment or family matters. H I

[9] The IO's report (lampiran B) was in respect of all the 26 respondents. The IO reported, inter alia, that his investigations revealed that all travel arrangements for the 26 respondents were made in Hong Kong by an unknown agent including procuring for them 26 Hong Kong passports which do not belong to the 26 respondents. Out of the 26 passports nine of them had been reported lost by their owners.

[10] The return air tickets and hotel accommodation in Argentina and Brazil of the 26 respondents were arranged by an agent in Hong Kong.

[11] Based on the above, the IO made the following conclusions that the 26 respondents are trafficked persons:

(a) genuine passports from China were changed to forged Hong Kong passports for the 26 respondents; and

(b) whilst the 26 respondents were in Malaysia, they were confined to their place of accommodation.

[12] The accused admitted to the immigration department that this is the third time that he was involved as the head of the delegation to go to Argentina and Brazil. In the first two times, the tourists from China who were brought there did not return after their tourism programme. On 1 May 2009, the accused was sent back to Malaysia from Buenos Aires as a deportee due to the loss of his passport.

[13] At the end of the IO's report, the IO applied for the IPO to be extended for three months for the purpose of recording the statement or deposition of the 26 respondents under s 52 of the Act and also for making arrangements for obtaining the necessary travel documents for the 26 respondents from the Embassy of China in Kuala Lumpur.

[14] The magistrate in his decision/comments stated that he agreed with the conclusion of the IO and ordered that the 26 respondents be handed over to the immigration department as provided in s 51(3)(b)(ii) of the Act.

[15] The learned DPP ('the DPP') submitted that the magistrate had erred in fact and in law in making his order. This is because if the magistrate agreed with the IO's report and findings that the 26 respondents are trafficked persons, then the magistrate's order should be made under s 51(3)(a)(ii) and not s 51(3)(b)(ii) of the Act.

[16] Sections 51(3)(a)(ii) and 51(3)(b)(ii) of Act provide as follows:

> 51(3) Where the Magistrate, having read the report produced under subsection (2), is satisfied that the person brought before him —
>
> (a) is a trafficked person and in need of care and protection, the Magistrate may make a Protection Order —
>
> (i) ...
>
> (ii) in the case of a trafficked person who is a foreign national, ordering that such trafficked person be placed in a place of refuge for a period not exceeding three months from the date of the order, and thereafter to release him to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63;
>
> (b) is not a trafficked person, the Magistrate may —
>
> (i) ...
>
> (ii) in the case of a person who is a foreign national, order that person to be released to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63.

[17] From the above provisions it is clear that s 51(3)(b)(ii) of the Act should not have been relied upon by the magistrate if he agreed with the IO's conclusion that the 26 respondents are foreign nationals and trafficked persons. It is erroneous for the magistrate to decide on the one hand that he agreed with the IO's conclusions and, on the other hand acted in a contrary manner under s 51(3)(b)(ii) of the Act and concluded that the 26 respondents are not trafficked persons and ordered their release. Due to this error by the magistrate, the 26 respondents were purportedly released. This hampered the work of the IO in proceeding to take further action under s 52 of the Act for an application to be made to the magistrate's court for the recording of evidence of the trafficked persons under s 52 of the Act.

[18] Apart from hearing the submissions of the DPP, I also heard the submissions of each of the 26 respondents. The majority of the 26 respondents questioned why they should be detained further to give another statement when earlier on they had already given their respective statements to the immigration department. All of them expressed a wish to be allowed to go back to their country of origin ie China as soon as possible without a need for further detention. This is due to several personal reasons eg their child has to attend school, have to take care of aged parents, family needs etc. They also asked for assistance to contact their families in China. In the event that this court makes an order for further detention, most of the respondents

requested that the order be made effective from the date of their arrest. They alleged that they had been in Malaysia since 29 July 2009 and had been arrested on the same day.

[19] I then directed the DPP to reply to the submissions of the 26 respondents. The DPP explained to all the 26 respondents that their first statements were taken for investigation purposes but a second statement has to be taken for prosecution purposes. He also informed them that they are not the accused persons charged for any offence under the Act, but instead they are trafficked persons to be placed in a place of refuge to enable the prosecution to take depositions of the 26 respondents so that during the prosecution proceedings of the accused later on, the 26 respondents do not have to come from China to give evidence in the court here.

[20] The DPP also informed the 26 respondents that should the depositions be completed earlier, then they can go back to their country earlier. In the meantime, the immigration department had already contacted the Embassy of China here for their assistance in getting the travel documents of the 26 respondents to enable them to go home.

[21] The DPP stated that the immigration department would assist the 26 respondents to contact their families in China as soon as possible.

[22] In deciding whether to allow the DPP's application to revise the magistrate's order, and further, to allow an extension of time for placement of the 26 respondents under s 51(3)(a)(ii) of the Act, I considered the report of the protection officer and the report of the IO to determine whether the 26 respondents are trafficked persons. The DPP cited to me the case of *Public Prosecutor v Nam Oithantip* [2008] 5 CLJ 285 where Mohd Zawawi Salleh JC held that the magistrate only referred to the report of the protection officer without considering the report of the IO which is required under s 51(3) of the Act. He also held that in deciding whether a person is a trafficked person or otherwise under the Act, the report of the IO is more relevant as compared to the report of the protection officer. He stated that looking at the division of duties and functions under s 51(1)(a) and (b) of the Act, the protection officer is only required to investigate the background of the victim.

[23] I fully agree with the decision in *Public Prosecutor v Nam Oithantip*. I further state here that the whole purpose of giving an IPO for 14 days under s 44(2) of the Act is for the purpose of carrying out an investigation and enquiry under s 51 of the Act. This is to enable:

(a) an enforcement officer to investigate into the circumstances of the person's case for the purpose of determining whether the person is a trafficked person under the Act; and

(b) a protection officer to enquire into the background of that person.

[24] Under s 51(2) of the Act, upon completion of the investigation and enquiry under s 51(1) of the Act, both the enforcement officer and the protection officer shall prepare a report for the purpose of satisfying the magistrate that such person is a trafficked person.

[25] Under s 51(3) of the Act, the magistrate, after having read the report under s 51(2), shall make the appropriate order depending on whether he is satisfied that the person is a trafficked person or otherwise.

[26] The legal requirements of s 51(3) are clear. Before making the order, the magistrate should have read the reports of the enforcement officer and the protection officer.

[27] In the present case, the protection officer only made a report on nine out of the 26 respondents. Such report is in the records of the file. However, there is nothing in the records to show that the magistrate considered that report. The records show that the magistrate made the order after considering only the report of the IO. That also is a legal error on the part of the magistrate.

[28] I find that the report of the protection officer is incomplete since there is no report on the remaining 17 male respondents. The report on the nine female respondents informed the magistrate that they were not trafficked persons.

[29] As in *Public Prosecutor v Nam Oithantip*, I am of the opinion that the report by the enforcement officer, ie the IO, is more relevant here since such report is not about the background and personal information regarding the person but instead it is about whether such person is a trafficked person.

[30] Going by the report of the IO, I am satisfied that the 26 respondents are trafficked persons and the order by the magistrate should be made under s 51(3)(a)(ii) and not s 51(3)(b)(ii) of the Act.

[31] I held that the magistrate had erred in fact and in law and his decision to release the 26 respondents under s 51(3)(b)(ii) of the Act is incorrect and improper under s 323 of the CPC. In exercise of my powers of revision under Chapter XXXI of the CPC, I allowed the application of the public

prosecutor. I set aside the order of the magistrate made under s 51(3)(b)(ii) of the Act and substituted it with an order under s 51(3)(a)(ii) of the same Act. I ordered that the 26 respondents be placed in a place of refuge for a period not exceeding three months from 17 August 2009, ie the date of expiry of the IPO, to enable the enforcement officer to make the necessary application under s 52 of the Act for the recording of their deposition or evidence before a magistrate.

[32] The above order is subject to any extension of the protection order of a foreign national that can be made upon application under s 51(5) of the Act.

[33] I further ordered that the immigration department and the prosecution take immediate steps under s 52(1) of the Act to record the evidence of the 26 respondents. This is to ensure that there is no unnecessary prolonging of the stay of the 26 respondents here so that they can go back to their home country as soon as possible.

Application for revision allowed.

Reported by Kohila Nesan